Court of Appeals No. 56415-7-II
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION 2

In re the Detention of:
Aron Nixon

Pierce County Superior Court

Cause No. 19-2-11754-6

The Honorable Judge Karena Kirkendoll

Appellant's Reply Brief

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I. RESPONDENT HAS CONCEDED THAT MR. NIXON WAS DENIED HIS RIGHT TO IMPEACH A CRITICAL STATE WITNESS.

Respondent agrees that Mr. Nixon should have been allowed to impeach Saunders with his prior inconsistent statements. Respondent's Brief, pp. 38, 41. However, the State erroneously suggests that the error was harmless. Respondent's Brief, pp. 38-45.

Saunders' statements went to the heart of the primary factual dispute. The State used Saunders to show sexual motivation, an element required for commitment in this case. RCW 71.09.020(18), (19). Saunders' statements also figured heavily into Dr. Fox's opinion that Mr. Nixon met criteria for commitment. RP 1535-1537, 1650, 1652-1657, 1850, 2694-2695.

Saunders' statements were thus critical to the State's case. The impeaching evidence was equally vital to Mr. Nixon's case. The court's improper refusal to allow impeachment prejudiced Mr. Nixon.

Jurors should be given "a full opportunity to assess [a witness'] credibility by hearing a prior statement that was inconsistent" with statements admitted at trial. *Fite v. Mudd*, 19 Wn. App. 2d 917, 940, 498 P.3d 538, 551 (2021), *review denied sub nom. Fite v. City of Puyallup*, 100925-9, 2022 WL 4093081 (Wash. Sept. 7, 2022).

The need for impeachment evidence is especially strong where the witness' credibility is paramount. *Am. Modern Home Ins. Co. v. Thomas*, 993 F.3d 1068, 1071 (8th Cir. 2021); *Alexander v. Greer*, 959 So. 2d 586, 591 (Miss. Ct. App. 2007).

Credibility is paramount when the parties present "diametrically opposed" descriptions of events. *Cummings v. Malone*, 995 F.2d 817, 825 (8th Cir. 1993). In such cases, "[t]he entire case… depend[s] on whose story the jury believe[s]." *Am. Modern Home Ins.*, 993 F.3d at 1071 (internal quotation marks and citation omitted). It is "crucial" that a litigant be given "[e]very opportunity to impeach." *Cummings*, 995 F.2d at 826.

Here, the parties presented diametrically opposed stories. *Id.*, at 825. Mr. Nixon testified that he had consensual sex with

Saunders, and that the assault followed. RP 2426-2433. By contrast, the State introduced Saunders' allegations of multiple rapes and assaults over the course of several days. RP 1054-1068, 1073-1091, 1176-1209. The "entire case thus depended on whose story the jury believed." *Id.*

The court admitted Saunders' statement that he "was raped repeatedly." RP 1067. The court excluded his statement that he was sexually assaulted only once. Ex. 160, Bates No. 618, 623; RP 1292-1308, 1312, 1327-1329, 1458-1459.

The court admitted Saunders' statement that he was trapped "for three days." RP 1067. The court excluded his statement that he was held for 30 hours or less. Ex. 160, Bates No. 617-618, 622-623, 690; RP 1292-1308, 1312, 1327-1329, 1458-1459.

The court admitted Saunders' statement that his mouth had been penetrated with a knife, a razor blade, and a scalpel. RP 1197, 1199. It excluded other statements where he referred only to a knife. Ex. 160, Bates No. 617-618, 621-624 690-691; RP 1312.

The excluded statements cast doubt on the statements that were admitted. At the very least, they suggest that Saunders had a propensity to exaggerate.

The court's error in excluding Saunders' prior inconsistent statements prejudiced Mr. Nixon. He should have been granted "[e]very opportunity to impeach" Saunders' account. *Cummings*, 995 F.2d at 826. Saunders' statements were central to the State's case and diametrically opposed to Mr. Nixon's own testimony.

Nor was the prejudice diminished by the introduction of Saunders' inconsistent statements through Dr. Fox. *See* Respondent's Brief, p. 44. Jurors were specifically instructed to consider such evidence only as the basis for Dr. Fox's opinion. CP 158. They are presumed to have followed this instruction. *State v. Weaver*, 198 Wn.2d 459, 467, 496 P.3d 1183 (2021). Thus, they did not use the inconsistent statements to evaluate Saunders' credibility.[1]

[1] Respondent incorrectly asserts that trial counsel cross-examined Fox about the inconsistences "to undermine J.S.'s credibility." Respondent's Brief, p. 44. Jurors were not permitted to use this testimony to assess Saunders' credibility. CP 158.

Jurors should have had "a full opportunity to assess [Saunders'] credibility by hearing a prior statement that was inconsistent" with his statements. *Fite,* 19 Wn. App. 2d at 940. The error was compounded by the court's refusal to give a missing witness instruction (as outlined below), which would have allowed jurors to draw an adverse inference from Saunders' absence.

The erroneous refusal to allow impeachment was not harmless. The commitment order must be vacated, and the case remanded with instructions to allow the impeachment.

II. THE COURT SHOULD HAVE GIVEN A MISSING WITNESS INSTRUCTION.

Saunders' absence from trial was significant. He was the only eyewitness supporting the State's claim that Mr. Nixon had a qualifying prior conviction. The court should have instructed jurors that they could draw an adverse inference from his failure to testify. *See* 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 5.20 (5th Ed); Appellant's Opening Brief, pp. 22-32.

A. Courts may instruct jurors on the missing witness rule in civil cases.

The missing witness rule "is an integral part of our jurisprudence." *Pier 67, Inc. v. King Cnty.*, 89 Wn.2d 379, 385–86, 573 P.2d 2 (1977) (internal quotation marks and citations omitted). The rule has long been applied in civil cases. *See British Columbia Breweries (1918) Ltd. v. King Cnty.*, 17 Wn.2d 437, 454, 135 P.2d 870 (1943); *Bengston v. Shain*, 42 Wn.2d 404, 410, 255 P.2d 892 (1953).

Furthermore, contrary to Respondent's assertion, instruction on the rule may be appropriate in civil cases. Respondent's Brief, pp. 85, 93-94; *see, e.g., Carroll v. Akebono Brake Corp.*, --- Wn.App. ---, ___, 514 P.3d 720 (2022). For example, a civil litigant may appropriately request an "adverse inference instruction" when a witness invokes the Fifth Amendment privilege against self-incrimination. *See Diaz v. Washington State Migrant Council*, 165 Wn. App. 59, 86, 265 P.3d 956 (2011).

Here, the court's refusal to provide an adverse inference instruction cannot rest on the suggestion that missing witness

instructions are improper in civil litigation. *See* Respondent's Brief, p. 93-94.

B. Mr. Nixon established the three prerequisites for a missing witness instruction.

Respondent concedes that Saunders' testimony was material and not cumulative. Respondent's Brief, p. 86. This satisfies the first requirement of the missing witness rule. Respondent's Brief, p. 86; Appellant's Opening Brief, p. 23; *see State v. Montgomery*, 163 Wn.2d 577, 598–99, 183 P.3d 267 (2008). The other requirements are satisfied as well: Saunders' absence was not satisfactorily explained, and he shared a "community of interest" with the State.[2] *State v. Blair*, 117 Wn.2d 479, 490, 816 P.2d 718 (1991).

When determining "whether a proposed jury instruction is supported by sufficient evidence, the trial court views the evidence and inferences in the light most favorable to the

[2] The pattern instruction suggests that all three factors are questions for the jury. Among other things, jurors must decide if "(1) The witness is within the control of, or peculiarly available to, that party; (2) The issue… is [one] of fundamental importance… (4) There is no satisfactory explanation of why the party did not call the person as a witness." WPIC 5.20.

proponent of the instruction." *Matter of Harvey*, 3 Wn. App. 2d 204, 218, 415 P.3d 253 (2018). When viewed in a light most favorable to Mr. Nixon, the record supports his request for a missing witness instruction.

Explanation for Saunders' absence. Contrary to Respondent's argument, the State did not provide a satisfactory explanation for Saunders' absence. Respondent's Brief, pp. 85, 92-93. Respondent claims that the State was excused from calling Saunders after he missed a defense deposition. Respondent's Brief, p. 92. The missed deposition does not provide a satisfactory explanation.

The missed deposition occurred months prior to trial. CP 983. Saunders was represented by counsel, and nothing suggests that his attorney had any difficulty contacting him. CP 973, 977, 980. Despite this, the State made no further effort to even speak with him, much less secure his attendance at trial. CP 973- 985.

Respondent cites several examples of satisfactory explanations that might defeat an adverse inference instruction. Respondent's Brief, p. 92. These include "when the witness is

incompetent, when the witness's testimony would be self-incriminating,[3] or if the witness cannot be located because he is transient and left town." Respondent's Brief, p. 92.

None of the examples outlined by Respondent apply here. There is no suggestion that Saunders was incompetent, at risk of self-incrimination, or unable to be located. Nor is Respondent's explanation akin to any of these examples.

Respondent asserts that the State "has a practice against forcing victim's [sic] to testify, in part, to avoid re-traumatizing them." Respondent's Brief, p. 93. But the State did not even ask Saunders if he wished to testify at trial.

Despite his reluctance to appear at a defense deposition, he may well have been willing to attend trial to help ensure Mr. Nixon's commitment. Without asking him, the State should not have assumed that he would refuse to testify at trial.

When taken in a light most favorable to Mr. Nixon (as the instruction's proponent), the record does not show a

[3] As noted above, a missing witness instruction may be appropriate in a civil case even where the witness's absence stems from the privilege against self-incrimination. *Diaz*, 165 Wn. App. at 86.

satisfactory explanation for Saunders' failure to appear at trial. Jurors should have been allowed to consider drawing an adverse inference from Saunders' absence.

Community of interest. The missing witness rule does not apply when the witness is "equally available to the parties." *Blair*, 117 Wn.2d at 490. However, the phrase "equally available" does not refer to the ability to secure the witness' presence in court. *Id.*

A witness "is not 'equally available' merely because he was physically present at the time of trial or could have been subpoenaed by either party." *State v. Davis*, 73 Wn.2d 271, 276, 438 P.2d 185, 188 (1968), *overruled in part on other grounds by State v. Abdulle*, 174 Wn.2d 411, 275 P.3d 1113 (2012). Thus, even a witness sitting in the hall outside the courtroom may not be "equally available" to the parties. *Id.*

Instead, "[a]vailability is to be determined based upon the facts and circumstances of that witness's *relationship to the parties*." *State v. Cheatam*, 150 Wn.2d 626, 653, 81 P.3d 830 (2003) (internal quotation marks and citations omitted) (emphasis added).

In other words, a witness is "available" to one party when there is "'such a community of interest between the party and the witness…as in ordinary experience would have made it reasonably probable that the witness would have been called to testify for such party except for the fact that his testimony would have been damaging.'" *Blair*, 117 Wn.2d at 490 (quoting *Davis*, *supra.*).

Under this definition, Saunders was not equally available to the parties. Instead, he was peculiarly available to the State. There was a "'community of interest'" between the State and Saunders, such that it would be "'reasonably probable'" that the State would call him as a witness. *Id.*

Saunders accused Mr. Nixon of multiple sexual assaults. RP 1054-1068, 1073-1091, 1176-1209. The State relied on Saunders' account as proof that Mr. Nixon met criteria for civil commitment. RP 2675, 2752. This establishes a community of interest between the State and its primary witness.

As the Supreme Court noted nearly a century ago,

> [W]here the witness is an actor in the transaction which gives rise to the controversy, and is presumably favorably disposed towards one of the parties, and that party does

> not produce him as a witness, it is presumed that his testimony, if produced, would be unfavorable to him.

Rosenstrom v. N. Bend Stage Line, 154 Wash. 57, 65, 280 P. 932 (1929). This observation applies here. Saunders was involved in the "transaction" and would naturally favor civil commitment for Mr. Nixon. Because of this community of interest, jurors were entitled to presume that his testimony "would be unfavorable" to the State. *Id.*

Respondent relies exclusively on an alternate test that can show a witness is peculiarly available to one party. If a party has "so superior an opportunity for knowledge of a witness" that it would be "reasonably probable" for that party to call the witness, the witness is peculiarly available to that party. *Blair*, 117 Wn.2d at 490.

Respondent does not appear to recognize that this is an alternate test.[4] *Id.* A witness may be peculiarly available to one party because *either* "they share a community of interest…*or* the party [has] [a] superior… opportunity for knowledge of [the] witness." *Id.* Only the community of interest standard is at

[4] Nor did the State recognize this in the trial court. There, the State did not address the "community of interest" alternative for determining availability. CP 973-974.

issue here. Mr. Nixon does not claim that the superior knowledge alternative test applies here.

Although Respondent cites the "community of interest" test, it applies only the superior knowledge test. Respondent's Brief, pp. 87-92. In support of its argument, Respondent compares this case to *State v. Reed*, 168 Wn. App. 553, 572, 278 P.3d 203 (2012).

In *Reed,* the witness was not peculiarly available to the prosecution under either test. *Id.* The defendant kept in contact with the witness, convinced her to "engage in conduct that would benefit his cause," and instructed her to recant her accusations. *Id.,* at 572-573. She refused to cooperate with the prosecution despite multiple efforts to persuade her to testify. *Id*., at 573.

Thus, in *Reed,* the prosecutor neither shared a community of interest with the witness nor had superior knowledge of her. *Id.* In fact, it appears the reverse was true, and the State might have been entitled to a missing witness instruction. *Id.*

This contrasts with Mr. Nixon's case. Even if the State did not have an "opportunity for superior knowledge" of

Saunders, it did share a community of interest with him. *Id.* Because of this, Saunders was not equally available to both parties. Instead, the community of interest made him peculiarly available to the State. *Id.*

Respondent also attempts to distinguish *Blair* and *Cheatam.* Respondent's Brief, pp. 88-92. In both *Blair* and *Cheatam,* the State was entitled to a missing witness instruction because each defendant had a superior opportunity for knowledge of the missing witness(es).

In *Blair*, the missing witnesses were people who owed the defendant money. *Blair*, 117 Wn.2d at 490. Many were identified by first name only. *Id.* The defendant told officers that he could locate the people on the list. *Id.*

Thus, in *Blair,* the absent witnesses were "peculiarly within the [defendant's] power to produce," because he "was the only one who could reasonably determine who the people were… [and] could locate the people." *Id.,* at 491 (internal quotation marks and citation omitted). The *Blair* court did determine if there was a community of interest between the

defendant and the people who owed him money. *Id.* Distinguishing *Blair* does not help the State.

Similarly, in *Cheatam*, the missing witness was the defendant's co-worker. *Cheatam*, 150 Wn.2d at 653. Both the witness and the defendant worked for the defendant's aunt. *Id.* These facts suggested that the defendant had a superior opportunity for knowledge of the missing witness. The *Cheatam* court found the witness "peculiarly available to the defense." *Id.*, at 654. However, it did not suggest that there was a community of interest between the defendant and the witness. *Id.* Distinguishing *Cheatam* does not help the State, because *Cheatam* does not address the community of interest test—the test upon which Mr. Nixon relies.

In this case, Mr. Nixon does not argue that the State had a superior opportunity for knowledge of Saunders. The *Blair* and *Cheatam* courts' application of that test is irrelevant here.

Instead, Mr. Nixon invokes the community of interest test to show that Saunders was not equally available to both parties. The evidence, when taken in a light most favorable to him, supports a missing witness instruction.

The rule applies because the State and Saunders shared a community of interest. Thus, "in ordinary experience [it would have been] reasonably probable that [Saunders] would have been called to testify for [the State] except for the fact that his testimony would have been damaging." *Blair*, 117 Wn.2d at 490.

Apart from the rule's technicalities, this result makes sense. The State based its case on Saunders' statements to third parties. The State would have called him as a witness if his testimony supported commitment.

The court should have instructed jurors that they were allowed to draw an adverse inference from Saunders' absence. Its failure to do so prejudiced Mr. Nixon.

C. The error requires reversal.

Standard of Review. Respondent asks this court to assume the trial judge correctly applied the law. Respondent's Brief, p. 85. The State argues that this is so because she made her ruling "after 'contemplating the[e] issue and reading the case law.'" Respondent's Brief, p. 85 (alteration in original, quoting RP 2664).

But research and thought do not insulate anyone from misinterpreting or misapplying the law.[5] This court should not presume that the trial judge correctly applied the law.

If the court did misinterpret or misapply the law, review is *de novo.* Appellant's Opening Brief, pp. 26-29. If the court refused the instruction based on a factual issue, review is for an abuse of discretion, but the facts supporting the instruction must be taken in a light most favorable to Mr. Nixon. Appellant's Opening Brief, pp. 29-31; *Harvey*, 3 Wn. App. 2d at 218.

In either case, the trial court erred. The commitment order must be vacated. Appellant's Opening Brief, pp. 22-32.

Prejudice. The court's error requires reversal if it affected "even one juror." *Magana v. Hyundai Motor Am.*, 123 Wn. App. 306, 318, 94 P.3d 987 (2004), *as amended* (Sept. 21, 2004), *as amended* (Feb. 23, 2005). Respondent does not dispute this standard. Respondent's Brief, pp. 84-94. Nor does

[5] The State's incomplete argument to the trial court confirms this. In the trial court, the State claimed that Saunders was equally available based on his physical availability. *See* Appellant's Opening Brief, pp. 27-28. This is not the correct standard.

Respondent claim the error was harmless. Respondent's Brief, pp. 84-94.

These failures may be taken as concessions. *See In re Pullman*, 167 Wn.2d 205, 212 n. 4, 218 P.3d 913 (2009); *State v. McNeair*, 88 Wn.App. 331, 340, 944 P.2d 1099 (1997). The lack of a missing witness instruction prejudiced Mr. Nixon. The commitment order must be vacated, and the case remanded for a new trial. If Saunders does not testify on retrial, Mr. Nixon will be entitled to a missing witness instruction.

III. THE COURT SHOULD HAVE ALLOWED MR. NIXON TO INTRODUCE THE ADMISSION OF A PARTY-OPPONENT.

In Mr. Nixon's criminal case, the State acknowledged that convictions for first-degree rape and first-degree kidnapping with sexual motivation were "doubtful." CP 78-79, 89-90. It did so to secure his conviction for assault.

In this case, the State reversed its position. In the civil commitment, the State unfairly relied on Mr. Nixon's guilty plea, using it as the foundation for its proof that he committed a sexually violent offense. RP 2672-2675.

Mr. Nixon should have been allowed to tell the jury of this inconsistency. In the prior proceeding, the State admitted that it was unlikely to secure a conviction for a sexually violent offense. This was the admission of a party-opponent. Appellant's Opening Brief, pp. 32-36.

Respondent does not address the merits of Mr. Nixon's argument.[6] Respondent's Brief, pp. 29-32. Instead, the State seeks to avoid the issue by arguing that the only issue available on review is the relevance of the evidence. Respondent's Brief, pp. 29-32. According to the State, it is now too late for Mr. Nixon to challenge the statement's relevance. Respondent's Brief, pp. 29-32.

This is incorrect.

Courts "*[g]enerally*… will not review an issue raised and argued for the first time in a reply brief." *Bergerson v. Zurbano*, 6 Wn. App. 2d 912, 926, 432 P.3d 850 (2018) (emphasis added). The rule is not absolute. In this case, it is appropriate

[6] Without argument, Respondent notes that the State does not concede that the prosecutor's statement fits within ER 801(d)(2). Respondent's Brief, p. 30 n. 5.

for the Court of Appeals to address the issue on its merits and determine if the evidence was relevant.

First, the State argued the relevance issue in its brief. Respondent's Brief, pp. 30-32. Mr. Nixon is entitled to answer the State's argument, since a reply brief may "respon[d] to the issues in the brief to which the reply brief is directed." RAP 10.3(c).

Furthermore, RAP 10.3(c) should be "liberally interpreted to promote justice and facilitate the decision of cases on the merits." RAP 1.2(a). The relevance issues should not be "determined on the basis of compliance or noncompliance with [the] rule[] except in compelling circumstances where justice demands." RAP 1.2(a).

This is not a case where "there is no opportunity for an opposing party to respond." *State v. Manthie*, 39 Wn. App. 815, 826 n. 1, 696 P.2d 33 (1985). The State has already responded. There are no "compelling circumstances" mitigating against review of the issue. Having anticipated and argued the issue, the State cannot now claim that it would be unfair to review arguments regarding the relevance of the evidence.

Second, Mr. Nixon's Opening Brief did refer to the relevance issue:

> In 2018, the State acknowledged that proof of sexual motivation was weak. This admission (like Mr. Nixon's plea statement) *was relevant* to an element required for commitment: whether Mr. Nixon committed a crime of sexual violence.

Appellant's Opening Brief, pp. 35-36 (emphasis added). Mr. Nixon's prejudice argument also suggested the reason the evidence was relevant:

> The court should have allowed Mr. Nixon to put before the jury this damaging admission. Without the impeaching evidence, a missing witness instruction, or the State's acknowledgment that its case was weak, Mr. Nixon was left with nothing but his own testimony to dispute Saunders' account.

Appellant's Opening Brief, p. 36.

The relevance issue is properly before this court.

The threshold for admitting relevant evidence "is very low." *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). The proponent need only show that the evidence is "minimally relevant." *Id.* This "is not a high hurdle." *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 670, 230 P.3d 583 (2010).

Jurors should have heard the State's admission that conviction on the original charge was doubtful. The admission was relevant to the issues faced by the jury.

The Court of Appeals should address the parties' arguments on their merits, reverse the commitment order, and remand with instructions to admit the evidence upon retrial.

IV. THE COURT SHOULD HAVE LET MR. NIXON TESTIFY THAT THE THREAT OF AN ROA PETITION WAS "DEFINITELY AN ADDED DETERRENT."

In his deposition, Mr. Nixon testified under oath that the prospect of an ROA petition was "definitely an added deterrent" against future offending. CP 364. Whether or not this contradicted other statements he made, this evidence was relevant and admissible. *See* Appellant's Opening Brief, pp. 36-51.

Respondent concedes that such evidence is relevant. Respondent's Brief, pp. 32-33 (citing *In re Det. of Post,* 170 Wn.2d 302, 241 P.3d 1234 (2010)). Despite this, the State claims that it was properly excluded. Respondent's Brief, pp. 33-35. Respondent's argument rests primarily on allegedly

contradictory statements that Mr. Nixon made. Respondent's Brief, pp. 35-37; *Cf* Appellant's Opening Brief, pp. 39-41.

Any contradictions went to the weight of the evidence, not its admissibility. *State v. Israel*, 113 Wn. App. 243, 268, 54 P.3d 1218 (2002). Inconsistencies are an appropriate subject for cross-examination. They are not a basis for excluding evidence.

Respondent also claims that evidence regarding ROA petitions would have "the potential to confuse the issues and mislead the jury." Respondent's Brief, p. 36 (citing ER 403).

This is not a valid basis to uphold the trial court's decision. Under ER 403, "[e]vidence is presumed admissible." *State v. Burkins*, 94 Wn.App. 677, 692, 973 P.2d 15 (1999). The burden of showing undue prejudice "is on the party seeking to exclude the evidence." *Hayes v. Wieber Enterprises, Inc.*, 105 Wn.App. 611, 618, 20 P.3d 496 (2001).

The trial court must "determine on the record whether the danger of undue prejudice substantially outweighs the probative value of [the] evidence, in view of the other means of proof and other factors." *State v. Powell*, 126 Wn.2d 244, 264, 893 P.2d 615 (1995); *State v. Acosta*, 123 Wn. App. 424, 433, 98 P.3d

503 (2004); *but see State v. Baldwin*, 109 Wn. App. 516, 528, 37 P.3d 1220 (2001) (suggesting that on-the-record balancing is only required under ER 404(b)).

The trial court did not do so in this case. RP 83-89; CP 139.

Further, the probative value of the evidence was not substantially outweighed by the risk of confusing the issues or misleading the jury. Even if the court had balanced the evidence on the record, it should not have been excluded.

The testimony Mr. Nixon wished to provide was simple and easily understood.[7] He wanted to tell jurors that a petition could be filed for something less than a new crime, and that this was "definitely an added deterrent" for him. CP 364.

If there were any danger of confusing or misleading the jury, the court could have crafted an appropriate limiting instruction. For example, the court could have told jurors to consider the evidence only for the limited purpose of assessing Mr. Nixon's likelihood of committing predatory acts of sexual

[7] It is difficult to see how the proffered testimony could be more confusing than the experts' lengthy discussions of arcane subjects.

violence. This is a purpose for which the State concedes the evidence is relevant. Respondent's Brief, pp. 32-33.

The State would then have the option of either delving into the specific requirements of an ROA petition (as outlined on pp. 36-37 of the State's brief) or requesting an instruction directing jurors not to speculate on the mechanics of ROA petitions.

The evidence was relevant, highly probative, and unlikely to mislead or confuse the jury. *Post, supra.* The State did not meet its burden under ER 403. *Hayes,* 105 Wn.App. at 618. Because the evidence should have been admitted, Mr. Nixon's commitment order must be reversed, and the case remanded for a new trial. *Post,* 170 Wn.2d at 317.

V. THE STATE LACKED STATUTORY AUTHORITY TO FILE A CIVIL COMMITMENT PETITION AGAINST MR. NIXON.

Mr. Nixon rests on the arguments set forth in Appellant's Opening Brief, pp. 51-59.

VI. RESPONDENT HAS CONCEDED THAT SOME CLOSED HEARINGS VIOLATED THE PUBLIC TRIAL RIGHT.

The trial court held multiple closed sessions in chambers. Appellant's Opening Brief, pp. 59-76. Respondent concedes that nine of these closed sessions violated the right to a public trial.[8] Respondent's Brief, pp. 70-84. However, according to Respondent, the violations are harmless. This is incorrect.

Prejudice to Mr. Nixon. Under Wash. Const. art. I, §10, Mr. Nixon had an "individual right to have the proceedings open to the observation and scrutiny of the general public." *In re Det. of D.F.F.*, 172 Wn.2d 37, 40, 256 P.3d 357 (2011) (plurality). His constitutional right was violated. Appellant's Opening Brief, pp. 62-73.

Constitutional errors are presumed to be prejudicial. *State v. Franklin*, 180 Wn.2d 371, 382, 325 P.3d 159 (2014). Because the improper closures violated Wash. Const. art. I, §10, they are presumed prejudicial. *Id.*

The State bears the burden of proving constitutional errors harmless beyond a reasonable doubt. *Id.* This requires a

[8] Mr. Nixon maintains that the other closures also qualified as violations. *See* Appellant's Opening Brief, pp. 59-76.

showing that the error was "trivial, or formal, or merely academic, *and* was not prejudicial to the substantial rights of the party assigning it, *and* in no way affected the final outcome of the case." *In re Det. of Pouncy*, 168 Wn.2d 382, 391, 229 P.3d 678 (2010) (internal quotation marks and citation omitted) (emphasis added).

Although Respondent agrees with this standard, it does not show how it applies in this case. Respondent's Brief, pp. 48, 70-84.

Respondent argues that several improper closures were harmless because the court ruled in Mr. Nixon's favor. Respondent's Brief, pp. 72, 74, 76, 80. Respondent does not cite any authority suggesting that favorable rulings render harmless an improper courtroom closure. Where no authority is cited, this court should presume that Respondent has found none after diligent search. *See City of Seattle v. Levesque*, 12 Wn.App.2d 687, 697, 460 P.3d 205 (2020).

Furthermore, even if Respondent is correct, it must *also* show that the public trial violation was "trivial, or formal, or merely academic." *Pouncy*, 168 Wn.2d at 391. This

requirement is independent of any effect on the trial. *Id.* To affirm, a reviewing court must find that the error was not trivial, formal, or merely academic. *Id.*

Here, Respondent does not argue that the errors meet this standard. Respondent's Brief, pp. 70-84. This amounts to a concession. *Pullman*, 167 Wn.2d at 212 n. 4; *McNeair*, 88 Wn.App. at 340.

This court's obligation to address non-trivial errors applies with special force regarding the argument on defense counsel's request "to strike a person of color from the venire." Respondent's Brief, pp. 71-72 (citing RP 937-942). There are overriding reasons why such arguments must be public, even though the court ultimately ruled in Mr. Nixon's favor. *State v. Sadler*, 147 Wn. App. 97, 115, 193 P.3d 1108 (2008).

Where an attorney is accused of making a racially biased challenge to a prospective juror, "the attorney's explanation itself constitutes new facts not previously before the public." *Id.* The court's decision "involves an evaluation not only of whether the attorney's explanation is consistent with what the

trial court observed during *voir dire*, but also of the challenging attorney's credibility." *Id.*

Mr. Nixon's open trial right encompassed this race-related issue. In the absence of public scrutiny, Mr. Nixon's basis for "strik[ing] a person of color from the venire" has been shielded from public view. Respondent's Brief, pp. 71-72 (citing RP 937-942). As a result, members of the public might believe that the commitment verdict came from a jury whose makeup reflected a race-based peremptory challenge.

This closure and the others outlined above and in Mr. Nixon's opening brief violated Wash. Const. art. I, §10. The State has not shown beyond a reasonable doubt that the error was "trivial, or formal, or merely academic, and [that it] was not prejudicial to the substantial rights of the party assigning it, and [that it] in no way affected the final outcome of the case." *Pouncy*, 168 Wn.2d at 391. The commitment order must be reversed, and the case remanded for a new trial. *Id.*

VII. MR. NIXON SHOULD HAVE BEEN ALLOWED TO ARGUE THAT THE STATE'S BURDEN OF PROOF INCLUDES A PRESUMPTION AGAINST COMMITMENT.

Mr. Nixon rests on the argument set forth in Appellant's Opening Brief, pp. 76-82.

VIII. THE ACCUMULATION OF ERRORS REQUIRES REVERSAL.

Mr. Nixon rests on the argument set forth in Appellant's Opening Brief, pp. 83-84.

CONCLUSION

The State has conceded that Mr. Nixon was improperly denied his right to impeach an important witness and that several hearings were improperly closed to the public. These errors prejudiced Mr. Nixon. They require reversal of the commitment order and remand for a new trial.

In addition, the court erred by refusing to give a missing witness instruction, by excluding the admission of a party-opponent, and by barring Mr. Nixon from testifying that the threat of an ROA petition would be an added deterrent to any risk of reoffence. These errors, too, require reversal of the commitment order.

Finally, the State lacked authority to file its petition. Regardless of the evidence available for trial, the State could not meet the threshold showing that Mr. Nixon had been "previously" convicted of a qualifying offense. Absent such a conviction, the commitment order must be reversed, and the case dismissed with prejudice.

I certify that this document complies with RAP 18.17, and that the word count (excluding materials listed in RAP 18.17(b)) is 5288 words, as calculated by our word processing software.

Respectfully submitted on September 19, 2022,

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CERTIFICATE

I certify that on today's date, I mailed a copy of this document to:

Aron Nixon
McNeil Island Special Commitment Center
P.O. Box 88600
Steilacoom, WA 98388

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia Washington on September 19, 2022.

_____
Jodi R. Backlund, No. 22917
Attorney for the Appellant

BACKLUND & MISTRY

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